85-881

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

RICHARD HALE AUSTIN,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTIONS PRESENTED

1. Was the Petitioner denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution?

2. Was the Petitioner denied due process of law, as guaranteed by Fourteenth Amendment to the United States Constitution, by the dismissal of the Petition for a Writ of Error Coram Nobis without an evidentiary hearing?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities.	iii-v
Opinion Below	1
Jurisdiction.	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	8
Statement of the Facts.	13
Argument in Support of the Issuance of the Writ of Certiorari:	
A. The Petition for Post-Conviction Relief Should have been Granted	24
B. The Trial Judge Erred in Dismissing the Petition for Writ of Error Coram Nobis	66
Conclusion and Prayer for Relief. . .	78
Index to the Appendix	82

TABLE OF AUTHORITIES

Page

Cases

Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975) 24-26

Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). . .25-27.41.40-50

Berhle v. United States, 100 F.2d 714 (D.C. 1938). 76

Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) 56-59

Eddings v. Oklahoma, 455 U.S. 104, 112, L.Ed.2d 1, 102 S.Ct. 869 (1982) 36

Green v. State, 187 Tenn. 545, 216 S.W.2d 305 (1948). 69-70

Hayes v. Maggio, 699 F.2d 198, 201-202 (5th Cir. 1983). 33

Hollis v. United States, 687 F.2d 257, 259 (8th Cir. 1982) 48

Martin v. Maggio, 711 F.2d 1273, 1279 (8th Cir. 1983) 33

Martin v. State of Texas, 694 F.2d 423, 424-425 (5th Cir. 1982) . . 48

Mooney v. Holohan, 294 U.S. 103, 110-112, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935). 69

TABLE OF AUTHORITIES (cont.)

Page

Moultrie v. State, 584 S.W.2d 217, (Tenn.Cr.App. 1978). 48

Nealy v. Cabana, 764 F.2d 1173, 1176 (5th Cir. 1985) 32

Rogers v. Israel, 746 F.2d 1288, 1296, n.8 (7th Cir. 1984). . . . 33

Rowe v. State, 498 S.W.2d 322 (Tenn. 1973). 72

State v. Johnson, 661 S.W.2d 854 (Tenn. 1983) 62

State ex rel. Richmond v. Henderson, 439 S.W.2d 263 (Tenn. 1969). . . 25

Strickland v. Washington, ___ U.S. ___, 80 L.ED.2D 674, 104 S.Ct. 2052 (1984). 28-36,40-41,50

Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1984) 56,58,59

United States v. Cronic, ___ U.S. ___, 80 L.ED.2D 657, 104 S.Ct. 203 (1984) 37-38

United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). 25-28,54

United States v. Goldberg, 531 F.2d 347 (2nd Cir. 1961). 76

United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976). 14,39

TABLE OF AUTHORITIES (cont.)

Page

United States v. Stewart, No. 73-2125 (Feb. 1974). 14,39

United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983) 40

Vela v. Estelle, 708 F.2d 954, 965 (5th Cir. 1983). 33

Watts v. Putnam County, 525 S.W.2d 488, 492 (Tenn. 1975). 73

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) 65

Statutes

T.C.A. 39-2-203 62-63

T.C.A. 39-2-205 9

T.C.A. 40-26-105. 66,69-72,75

Other Authorities

18 Am.Jur.2d CORAM NOBIS, ETC. §1, p.446. 68

70 C.J.S. Perjury §59, p.530. 76

24 C.J.S. Criminal Law §1602(2), p.667. 68

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Petitioner, Richard Hale Austin, respectfully prays that a writ of certiorari be issued to review the judgment and order of the Supreme Court of Tennessee entered on July 8, 1985 and resulting in the affirmation of his conviction and sentence of death by electrocution.

OPINION BELOW

The judgment and order of the Supreme Court of Tennessee appears in the Appendix as A-1, and the decision has not been

reported. A petition for rehearing was timely filed on behalf of the Petitioner. The judgment and order of the Supreme Court of Tennessee denying the Petition for Rehearing filed on behalf of the Petitioner is dated September 3, 1985, and appears in the Appendix as A-2.

JURISDICTION

The judgment and order of the Supreme Court of Tennessee was dated July 4, 1985. A petition for rehearing was timely filed on July 29, 1985. The judgment and order denying the petition for rehearing is dated September 3, 1985. This Petition for Writ of Certiorari is filed within the time allowed by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTION OF THE UNITED STATES, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. CONSTITUTION OF THE UNITED STATES, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

III. CONSTITUTION OF THE UNITED STATES, Amendment XIV:

"...[N]or shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV. TENNESSEE CODE ANNOTATED §40-26-105

"Writ of error coram nobis.--There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. Notice of the suing out of the writ shall be served on the district attorney general. No judge shall have authority to order the person having custody of the petitioner to produce him in court for the hearing of the proceeding. The relief obtainable by

this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigation on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that he was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in

favor of the petitioner the judgment complained of shall be set aside and he shall be granted a new trial in that cause. In the event a new trial is granted the court may, in its discretion, admit the petitioner to bail, provided the offense be bailable. If not admitted to bail the petitioner shall be confined in the county jail to await trial. The petitioner or the state may pray an appeal in the nature of a writ of error to the Supreme Court from the final judgment in this proceeding."

STATEMENT OF THE CASE

This matter comes before the Court on a petition for writ of certiorari arising from an order and judgment denying relief sought by the Petitioner under Tennessee post-conviction remedy statutes.

The Petitioner, Richard Hale Austin, was indicted in early July, 1977 as an accessory before the fact to murder in the first degree and for the crime of murder (R.[1/]34). The trial of the Petitioner commenced on October 17, 1977, and concluded on October 22, 1977, (Trial Transcript,[2/] 2, 1138-1141). The Petitioner

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1/ References to "R." are references to the record as it appears below.

2/ References to the "Trial Transcript" are references to the trial transcript of the Petitioner's trial for murder. References simply to "Tr." are references to the transcript of the hearing on the Petition for Post-Conviction Relief.

was convicted on both counts of the indictment and, upon a finding of a statutory aggravating circumstance, was sentenced to death by electrocution (Trial Transcript, 1138-1141).

A Motion for New Trial was filed on November 7, 1977 (R.36). By that Motion it was asserted that the evidence was not sufficient to sustain the verdict and that the evidence preponderated in favor of the Petitioner's innocence. It was also asserted that the Tennessee Death Penalty Statute was contrary to the Constitutions of the State of Tennessee and the United States. The Motion for New Trial was overruled by an order of the Court which was entered on January 27, 1978. (Hearing Exhibit No. 21).

The Petitioner perfected a direct appeal to the Supreme Court of Tennessee pursuant to T.C.A. §39-2-205. The

Tennessee Supreme Court affirmed the Petitioner's conviction and sentence in its opinion, State v. Austin, 618 S.W.2d 738 (Tenn. 1981).[3/] A Petition for Rehearing was filed but was denied by an Order of the Court entered on July 27, 1981 (R.14).

On September 25, 1981, a Petition for Writ of Certiorari was filed with the Supreme Court of the United States. The Petition was denied by the Court at 454 U.S. 1128, 71 L.Ed.2d 116, 102 S.Ct. 980 (1981).

On March 26, 1982, a Petition for Post-Conviction Relief, attacking the effectiveness of the Petitioner's trial counsel, was filed on behalf of the Petitioner (R.34-46). On March 12, 1982, a Petition for Writ of Error Coram Nobis was

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3/ A copy of this opinion appears in the Appendix as A-__.

filed on behalf of the Petitioner (R.21-39). A hearing on these petitions commenced on December 6, 1983 (Tr., 1). At the outset of the hearing, after hearing the argument of counsel, the trial judge ruled that the Petition for Writ of Error Coram Nobis should be dismissed. After hearing the proof presented, the trial judge denied the Petition for Post-Conviction Relief and he dismissed the Petition for a Writ of Error Coram Nobis (R.152-165).

Thereafter a Notice of Appeal was timely filed on behalf of the Petitioner (R.166). Oral argument before the Court of Criminal Appeals occurred on January 15, 1984. By an order and opinion of the Court of Criminal Appeals dated April 17, 1985 (a copy appears in the Appendix as A-3), the decision of the trial judge was affirmed.

On May 17, 1985, an Application for Permission to Appeal to the Supreme Court of Tennessee was filed. By an Order entered July 8, 1985, the Supreme Court of Tennessee denied the Application thereby refusing to consider an appeal on the issues considered by the Court of Criminal Appeals (See Appendix, A-1). On July 29, 1985, a petition asking the Supreme Court to rehear its decision to not consider the appeal was filed. By a judgment and order dated September 3, 1985, the Supreme Court of Tennessee denied the petition to rehear (See Appendix, A-2). This matter is now before the Court upon the Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

The Petitioner, Richard Austin, was indicted in July, 1977, as an accessory before the fact to the murder of Julian Watkins, a police informant. The Petitioner was indicted along with Terry Casteel for this murder (Trial Transcript 2; Tr. 460-461).

After a trial that commenced October 17, 1977, the Petitioner was convicted on both counts (Trial Transcript, 2, 1048, 1138-1141). After a sentencing hearing was conducted, the Petitioner was sentenced to die by electrocution (Trial Transcript, 1138-1141).

Before, during, and for a while after the Petitioner's trial, the Petitioner was represented by Robert I. Livingston, an attorney licensed to practice in the State of Tennessee (Tr. 363-364, 424-427, 490-491).

Mr. Livingston started practing law in 1955. His practice included some amount of criminal law experience. Mr. Livingston testified that he had handled 2 or 3 murder cases as a solo practitioner (including Mr. Austin's case) and that he tried some murder cases when he was associated with the public defender's office (Tr. 315-316, 431, 461-462). The evidence at the hearing demonstrates that the United States Court of Appeals for the Sixth Circuit had determined in two separate instances (United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976); and United States v. Stewart, (No. 73-2125, Feb. 1, 1974) that Mr. Livingston had not rendered effective assistance of counsel as required by the Constitution (Tr. 442-450).

Before the Petitioner was arrested for the murder of Julian Watkins, the Petitioner and his wife, Joanne Austin,

were being represented by Mr. Livingston on gambling charges brought against both the Petitioner and his wife (Tr. 451). Mr. Livingston's representation of both the Petitioner and his wife on the gambling charges continued until sometime after the Petitioner's trial for murder (Tr. 451). Mr. Livingston testified that the theory he utilized at the Petitioner's trial was to convince the jury that Joanne Austin and Terry Casteel employed Jack Blankenship to murder Julian Watkins (Tr. 465-466). Mr. Livingston further testified that it never occurred to him that there might be some conflict of interest (Tr. 452).

On or about July 8, 1977, the Petitioner was arrested at his sister's home in Mississippi. After discussing his situation with Mr. Livingston, it was suggested that the Petitioner waive extradition. Thereafter the Petitioner

waived extradition, and was transferred to the jail in Shelby County, Tennessee. The Petitioner's health was the primary reason for the waiver of extradition. On July 11, 1977, Petitioner appeared in General Sessions Court of Shelby County, Tennessee. During this appearance, the Petitioner's bond was set at $100,000.00 and a preliminary hearing was waived (Tr. 92-94, 463-465).

Some time shortly after the appearance in the General Sessions Court, Mr. Livingston, the Petitioner and members of the Petitioner's family had a meeting in the offices of a bail bonding company (Tr. 94-95). During this meeting the Petitioner encouraged Mr. Livingston to go to the Shelby County Jail and interview Terry Casteel and Jack Blankenship (Tr. 96). Shortly thereafter Mr. Livingston attempted to see Casteel, but Casteel refused to talk

with him (Tr. 96-97). However, Mr. Livingston did interview Jack Blankenship and obtained a written statement (Tr. 96-97, 237, 240, 332). This interview took place on or about July 14, 1977 (Tr. 332). Prior thereto, on July 7, 1977, Jack Blankenship had pled guilty to the murder of Julian Watkins (Tr. 234-237). During this interview, Blankenship was less than truthful about certain aspects of the events surrounding the murder of Julian Watkins (Tr. 241-242). However, Blankenship positively maintained at that time, and at the hearing of this matter, that the Petitioner had nothing to do with Julian Watkins' murder (Tr. 242, 251, Hearing Exhibits No. 9 and 10).

In testimony at the hearing, Mr. Livingston's recollection was that he and the Petitioner had several meetings in person and that they discussed the case

over the telephone on other occasions (Tr. 474). However, he had no memoranda or other paper writings whatever that would suggest any time spent with the Petitioner conferring about his case (Tr. 324-331). Furthermore, Mr. Livingston stated that he had not talked to his client about taking the stand until after the State rested its case (Tr. 399). Other than the statement of Jack Blankenship dated July 14, 1977, there was nothing in Mr. Livingston's file to suggest he conducted any interview of any witness related to the murder case (Tr. 332). In fact, Mr. Livingston testified that there was never any intention to take any witnesses' statements (Tr. 413-414). Additionally, Mr. Livingston testified that there was no room in his defense theory for Jack Blankenship (Tr. 482) and that he would not believe Blankenship "on a stack of Bibles." (Tr. 404). Mr. Livingston

never called Jack Blankenship to testify during the Petitioner's trial (Tr. 482).

At the hearing the Petitioner called, as expert witnesses, Mr. Russell X. Thompson and Marvin Ballin, two lawyers experienced in criminal cases (Tr. 492-493; 536-537). Both witnesses testified that a lawyer of ordinary skill and training would have recognized the existence of a substantial defense in the testimony of Blankenship (Tr. 497-502; 538-542). They also testified that armed with the knowledge that the State did not have a statement from Blankenship, an attorney of ordinary skill and training would be under an obligation to further investigate, even during the trial, the potential testimony of Blankenship (Tr. 505-506; 545-546). Further, Mr. Thompson, based upon the testimony of Mr. Livingston that he heard at the hearing, testified that Mr.

Livingston did not perform as an attorney or ordinary skill and training in the investigation of the Petitioner's case (Tr. 510).

Mr. Livingston did not offer a single witness and did not attempt to introduce one piece of evidence during the sentencing stage of Mr. Austin's trial (Trial Transcript, 1055-1110). Mr. Livingston testified that he did not recall every having an intention to call witnesses at the sentencing stage (Tr. 360). The result was that the State made an attempt to demonstrate that at least three aggravating circumstances existed, and Mr. Livingston made little or no attempt to rebut the existence of any of those aggravating circumstances or to submit to the jury any mitigating circumstances (Trial Transcript, 1055-1110). Mr. Livingston failed to introduce any evidence during the

sentencing stage despite the fact that the judge presiding over the murder trial stated on the record that Mr. Livingston would not be restricted to simply the statutory mitigating circumstances (Trial Transcript, 1051). Mr. Livingston's actions in this regard bear out his inadequate preparation, at least during the sentencing stage of the trial.

Subsequent to the Petitioner's trial, Mr. Livingston filed a Motion for New Trial (Tr. 137-139). Immediately prior to the filing of the Motion for New Trial, the Petitioner's present counsel was employed by members of the Petitioner's family to review the trial transcript and render an opinion as to whether reversible error occurred during the course of the Petitioner's trial (Tr. 687-689, Hearing Exhibit No. 22).

The Petitioner's present counsel were assured by Mr. Livingston that Mr. Livingston would entertain and accept their suggestions as to matters to be included in either an amended or supplemental motion for new trial while the transcript of the Petitioner's trial was being prepared and reviewed (Tr. 423, 424, 137-138). Thereafter, Mr. Livingston wrote to the Petitioner and assured him that if he (Mr. Livingston) did not have an opportunity to study the trial transcript before the hearing on the Motion for New Trial, he would ask the court to reset the hearing until he had an opportunity to study the transcript (Tr. 421-422, Hearing Exhibit No. 2). Without having reviewed the transcript, Mr. Livingston submitted the Motion for New Trial, without argument, to the court on January 27, 1978 (Tr. 422-423, 425, 490, Hearing Exhibit 21), and an order

overruling the Motion for New Trial was entered at that same time (Hearing Exhibit No. 21).

While present in court on March 16, 1978, on a Motion to Rehear the Motion for New Trial filed by the Petitioner's present counsel, and while he was still counsel of record, Mr. Livingston referred to the Petitioner as a "crook". (Tr. 409-411, 429-430). In addition, in a letter to the Petitioner dated February 22, 1978 (a copy of which was sent to Judge Beasley), Mr. Livingston stated, "I have been receiving obscene and threatening telephone calls recently. You and your wife have not 'let a contract' on me have you?" (Tr. 144-147, 425-428, Hearing Exhibit No. 6).

ARGUMENT

I.

The Petition for Post-Conviction Relief Should Have Been Granted

It is contended that the evidence demonstrated that Mr. Livingston failed to perform as well as a lawyer with ordinary training and skill in the criminal law would have and that he failed to conscientiously protect the Petitioner's interests and rights during the period of his representation of the Petitioner. Accordingly, the Petitioner was deprived of his rights under the Sixth Amendment to the Constitution.

Range of Compentency Standard

In 1975 the Tennessee Supreme Court in Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), announced a new standard of competency to be applied in Tennessee for determining the adequacy of representation in criminal cases. The standard is

> "...simply whether the advice given, or the services rendered by the attorney, are within the range of competency demanded of attorneys in criminal cases." Id.. at 936.

The court indicated that the measure of the "range of competency" for attorneys in criminal cases was to be taken from United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); and the American Bar Association Standards Relating to the Administration of Criminal Justice. Id., at p.936.

Before the Baxter v. Rose decision Tennessee had followed the "farce, sham, or mockery of justice" standard, State ex rel. Richmond v. Henderson, 439 S.W.2d 263 (Tenn. 1969); but following the trend away from that standard, Tennessee adopted the more stringent standard of competency for counsel.

In Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), the Court of Appeals for the Sixth Circuit held that a defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously, and unaffected by conflicting considerations, protect his client's interest. Stated affirmatively, counsel is required to render reasonably effective assistance, and:

> "It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence .... Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner." Id., at 696.

In the second federal opinion followed by the Tennessee Supreme Court in Baxter v. Rose, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), the Court of Appeals

for the District of Columbia Circuit announced some of the duties owed by an attorney to a client while making it clear that the enumerated duties are only starting points for other courts to develop additional measurements on a case-by-case basis:

> "In General--Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.
>
> Specifically--(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.
>
> (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.... Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence.

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." Id., at pp.1203-1204.

In the case of Strickland, v. Washington, ___ U.S. ___, 80 L.Ed 2d 674, 104 S. Ct. 2052 (1984), this Court considered a claim of ineffective assistance of counsel. This case marked the first time that the Court considered such a claim in any generality. 80 L.Ed.2d at p. 690. Having noted that lower Federal

courts and State courts had previously adopted various tests measuring the effectiveness of counsel in criminal cases, the Court imposed a two-component test in considering a convicted defendant's claim that counsel's assistance was ineffective. The Court stated that:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 80 L.Ed.2d at p. 693 (Emphasis added).

With respect to the first component of the test, the Court stated that "the proper standard for attorney performance is that of reasonably effective assistance." 80 L.Ed.2d at p.693. Although declining to

establish specific guidelines by which to judge the performance of counsel in criminal cases, the Court did emphasize certain "benchmarks" or principles by which the courts should be guided. For example, the Court stated that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." 80 L.Ed.2d at pp.692-293. In addition, the Court stated that in deciding an ineffectiveness claim a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 80 L.Ed.2d at p. 695.

The test established by the Court in Strickland v. Washington for judging the effectiveness required by the Sixth

Amendment requires not only that counsel's performance be deficient but also requires that such deficient performance be prejudicial to the defense. The Court placed the burden of proving prejudice on the convicted defendant. However, the Court pointed out that in certain contexts, prejudice is presumed 80 L.Ed.2d at p. 696. One such situation noted by the Court and which, it is submitted, is applicable to the case sub judice is when counsel is burdened by a conflict of interest. The proof adduced at the hearing demonstrated that during a part of the time the attorney-client relationship existed between the Petitioner and Mr. Livingston, Mr. Livingston was burdened with conflicting considerations.

With respect to proving prejudice, where prejudice is not presumed, the Court in Strickland v. Washington stated that:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 80 L.Ed.2d at p. 698 (Emphasis added).

The Court further stated that in making the determination of whether prejudice exists, a court "must consider the totality of the evidence before the judge or jury." 80 L.Ed.2d at p. 698.

Whether a defendant has received effective assistance of counsel is a mixed question of fact and law. Nealy v. Cabana, 764 F.2d 1173, 1176 (5th Cir. 1985). Accordingly, on appeal, a court must make an independent investigation if determining whether a counsel's representation satisfied the standards dictated by the Sixth and Fourteenth Amendments. Id.

It is the Petitioner's burden to prove the allegations of incompetent representation by a simple preponderance of the evidence. Rogers v. Israel, 746 F.2d 1288, 1296, n.8 (7th Cir. 1984); Vela v. Estelle, 708 F.2d 954, 965 (5th Cir. 1983); Martin v. Maggio, 711 F.2d 1273, 1279 (8th Cir. 1983); Hayes v. Maggio, 699 F.2d 198, 201-202 (5th Cir. 1983).

Applying the standards set out by the Court in Strickland v. Washington, it is submitted that proof adduced at the hearing demonstrated that the Petitioner was denied the effective assistance of counsel.

The proof relating to Mr. Livingston's failure to call Jack Blankenship as a witness during the Petitioner's trial, to the exclusion of any other evidence of Mr. Livingston's ineffectiveness, demonstrates that the Petitioner was denied effective assistance of counsel. Viewing the

circumstances that existed at the time the Petitioner was tried, the result of the Petitioner's trial would reasonably likely have been different had the testimony of Jack Blankenship been presented at the Petitioner's trial.

The existence of not one but several instances whereby Mr. Livingston's conduct fell below that required of attorneys in criminal cases leads one to the conclusion that the Petitioner's trial cannot be relied upon as having produced a just result. Mr. Livingston's ineffectiveness was so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without the showing of any prejudice Strickland v. Washington, 80 L.Ed.2d at p. 704, n.2.

Coincidently, Strickland v. Washington involved a situation where the Court was presented with a claim that the defendant,

who had pled guilty to first degree murder, received ineffective assistance of counsel in relation to the capital sentencing proceedings. In this regard the Court stated that a capital sentencing proceeding

> "is sufficiently like a trial in its adversarial format and in the existence of standards of decision, [citations omitted] that counsel's role in the proceeding is comparable to counsel's role at trial - to insure that the adversarial testing process works to produce a just result under the standards governing decision." 80 L.Ed.2d at p. 693.

This conclusion finds its rationale in the Court's directive that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding. 80 L.Ed.2d at p. 704 (Brennan, J., concurring in part and dissenting in part).

In regard to the capital sentencing proceedings the Court has insisted that the

sentencer must be permitted to consider any relevant mitigating factor. Strickland v. Washington, 80 L.Ed.2d at p. 705; Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, L.Ed.2d 1 (1982).

The facts of this case demonstrate that no evidence of any sort was presented on behalf of the Petitioner during the course of the sentencing phase of his trial. In fact, Mr. Livingston indicated that he never interviewed any potential witness for the sentencing phase of the Petitioner's trial and that he did not recall even having the intention of calling any witnesses during the sentencing phase (Tr. 360-362). These facts conclusively prove that Mr. Livingston totally abrogated his duty to investigate and prepare a defense during the sentencing phase of the Petitioner's trial. As a result there was no "reliability" in the imposition of the death penalty in the Petitioner's case.

Criteria for Measuring the Conduct of Counsel

The courts have utilized measuring criteria beyond simply "consultation, advice and investigation." The courts have utilized such additional criteria as the "experience of counsel", "failure to seek discovery by proper procedures", "prefunctory examination of witnesses", "conduct at trial exceeding the limits of propriety", "improper trial tactics and strategy" and "abandonment of appellate rights". The Petitioner shall attempt to examine evidence presented at the hearing in the context of some of the measuring criteria utilized by the courts.

1. Experience of Counsel

In United States v. Cronic, ___ U.S. ___, 80 L.Ed.2d 657, 104 S.Ct. ___ (1984), the Court indicated that the "experience of counsel," though not providing a basis for

concluding that effective assistance of counsel was afforded, is, nevertheless, relevant to that evaluation. 80 L.Ed.2d at pp. 663, 670.

During the hearing Mr. Livingston testified that he started practicing law on February 1, 1955 (Tr. 461), that he served as an assistant public defender on two occasions and that as a public defender he had had more experience in criminal matters than he had every had as a private lawyer (Tr. 462, 315-316). He also testified that he had tried "two, maybe three" murder cases in his private practice and more than he can recall as a public defender (Tr. 315-316, 461-462).

As proof on the element of Mr. Livingston's range of experience of counsel, the trial judge allowed the Petitioner to introduce evidence that on two separate occasions Mr. Livingston had

been found by the Court of Appeals or the Sixth Circuit to have rendered ineffective assistance as required by the Constitution. These cases were United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976) and United States v. Stewart, No. 73-2125 (February 1, 1974). In his testimony to the trial judge regarding the Goodwin case, Mr. Livingston admitted that he had previously stated that Judge Bailey Brown (who at that time was a Judge of the United States District Court for the Western District of Tennessee and who is now a judge of Court of Appeals for the Sixth Circuit) and his client, Mr. Goodwin, were both incompetent (Tr. 441-442).

2. Failure to Seek Discovery

The record reflects that Mr. Livingston made little or no effort to pursue even the limited discovery rights

afforded to the defense in State prosecutions. Failure to pursue discovery rights prejudices a defendant, creates uninformed trial tactics and leads to less than effective cross-examination. In Strickland v. Washington, supra, the Court stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 80 L.Ed.2d at p. 695. "Pretrial investigation and preparation are the keys to effective representation of counsel." United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983).

Mr. Livingston did not prepare and file any pre-trial discovery motions, and he testified that he had no intention of filing any pre-trial motions (Tr. 331-332). Mr. Livingston also testified that he had no recollection of ever reviewing the

physical evidence obtained by the State and to be utilized in the Petitioner's trial (Tr. 366-367).

3. Improper Trial Tactics and Strategy

Trial tactics and strategy are not to be reviewed by hind-sight but on the basis of whether some other action, which would have better protected the defendant, was reasonably foreseeable at this time. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). In Strickland v. Washington, supra, the Court stated that a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 80 L.Ed.2d at p. 694.

The failure to utilize the testimony of Jack Blankenship and/or the failure to leave open the option to call Jack Blankenship to the stand to exculpate the Petitioner was an improper strategy, and this was clearly reasonably foreseeable by an attorney with ordinary skill and training and, as a result, was outside the wide range of professionally competent assistance. The result of the actions and inactions of Mr. Livingston in this regard denied the Petitioner a substantial defense by excluding, from the jury's consideration, the testimony of Jack Blankenship, the confessed killer of Julian Watkins.

On July 7, 1977, Blankenship pled guilty to the murder(Tr., 234; Hearing Exhibit No. 12). On July 14, 1977, Mr. Livingston interviewed Blankenship and obtained a statement (Tr., 400; Hearing

Exhibit Nos. 9 and 10). In the course of the statement Blankenship admitted receiving money to kill Mr. Watkins, but Blankenship stated that he was given the money by "James Stevens" and that an individual by the name of "David" (as opposed to Casteel) went to the body shop with Blankenship when Mr. Watkins was killed. Blankenship denied that the Petitioner was involved. Mr. Livingston met with Blankenship for just a short period of time a week or so later (Tr. 403).

Mr. Livingston never succeeded in interviewing Terry Casteel, who was indicted along with the Petitioner (Tr. 463, 460-461, 403). In September, 1977, Mr. Casteel's attorneys filed a motion to sever the trial of Mr. Casteel and the Petitioner. The State joined in the motion to sever, and the motion was granted (Trial

Transcript, 2-5). Mr. Livingston testified that he was fully expecting that Casteel was going to turn State's evidence before the trial (Tr. 463).

Being on notice of adverse testimony from Casteel, Mr. Livingston made no effort, either before or during the trial, to reinterview Blankenship and discuss Casteel's involvement in the offense (Tr. 403). Mr. Livingston opened his defense by an attack, in his opening statement, on Blankenship as a potential State witness (Tr. 540-542; Trial Transcript, 274-275), thereby foreclosing the option on his part to call Blankenship as a defense witness. Mr. Livingston knew or should have known that the State had not obtained any statement from Jack Blankenship (Tr. 414-415).

In support of the Petitioner's position at the hearing that prejudicial

error was committed by Mr. Livingston in regard to his failure to reinterview and call Blankenship as a witness, the Petitioner called, as expert witnesses, Mr. Russell X. Thompson and Mr. Marvin Ballin, two laywers experienced in criminal cases (Tr. 492-493; 536-537). Both of these witnesses testified that a lawyer of ordinary skill and training would have recognized the existence of a substantial defense in the testimony of Blankenship (Tr. 497-502; 538-542). They also testified that armed with the knowledge that the State did not have a statement from Blankenship, an attorney of ordinary skill and training would be under an obligation to further investigate, even during the trial, the potential testimony of Blankenship (Tr. 505-506; 545-546). Further, Mr. Thompson, based upon the testimony of Mr. Livingston he heard at the

hearing, testified that Mr. Livingston did not perform as an attorney of ordinary skill and training in the investigation of the Petitioner's case (Tr. 510).

In his testimony Mr. Livingston stated that the reason he did not call Blankenship was that he did not believe him and that he would not put Blankenship on the stand under any circumstances (Tr. 403, 432). However, the key portion of Blankenship's testimony, i.e. that the Petitioner, Richard Austin, had not hired him to kill Julian Watkins, was consistent with his client's position and testimony. Although Mr. Livingston had reason to believe that Blankenship had, in his statement to Mr. Livingston, not been truthful in all particulars, Mr. Livingston, in keeping with his client's position and sworn testimony, was, under facts and circumstances reasonably foreseeable,

required to call Blankenship as a witness and properly ask "Did Richard Austin hire you, Jack Blankenship, to murder Julian Watkins?" and Blankenship would have responded, "No" (Tr. 245-248).

This would have followed the requirement to offer admissible evidence his client desired and would want to have presented without surrendering any fairly held conviction by Mr. Livingston that other details of Blankenship's statement to him were not true. Mr. Livingston failed in his duty to reinterview Mr. Blankenship and obtain a statement from Blankenship as to Casteel's involvement which would have removed any concern Mr. Livingston had as to the full scope of Blankenship's statement.

4. Failure to Advise and/or Pursue Appellate Rights

Clearly, the abandonment of a defendant's appellate rights or failure to pursue appellate rights (when instructed to do so) constitutes ineffective assistance of counsel. Martin v. State of Texas, 694 F.2d 423, 424-425 (5th Cir. 1982); Hollis v. United States, 687 F.2d 257, 259 (8th Cir. 1982); Moultrie v. State, 584 S.W.2d 217, 218 (Tenn.Cr.App. 1978). By his failure to maintain his agreement with the Glankler firm and his client to reschedule the "Motion for New Trial" (Tr., 690-692) until the transcript could be obtained and reviewed, Mr. Livingston foreclosed and abandoned certain of the Defendant's rights on direct appeal, including, but not limited to, the error in introduction of prejudicial hearsay evidence and the error in the introduction of improper evidence at the sentencing hearing.

The issues on appeal of the Petitioner's conviction were limited to the sufficiency of the evidence and the constitutionality of the death penalty statute since only these issues were presented to the trial court on the motion for new trial (Tr. 654-655).

At the time Livingston submitted the motion for new trial to the trial court, and thereby limited the Defendant's appellate issues, Livingston had failed to review the trial transcript that was becoming available to determine what additional appellate error should be preserved (Tr. 422-424).

5. Conflicting Considerations

In Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), the Sixth Circuit stated that an attorney

> "...must conscientiously protect his client's interest, undeflected by conflicting considerations." Id., at p.696. (Emphasis supplied).

In Strickland v. Washington, supra, the Court stated that "[c]ounsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflict of interest." Id., 80 L.Ed.2d at p. 694.

In several instances, Mr. Livingston has by his conduct and statements acted because of considerations, personal and professional, in actual conflict with his client's fundamental rights and interests.

At the hearing Mr. Livingston testified that he did not trust his client (Tr. 415).

After the trial, Mr. Livingston breached an agreement he had with the law firm of Montedonico, Heiskell, Davis, Glankler, Brown and Gilliland (the Glankler

firm), wherein Mr. Livingston agreed to have any hearing on a motion for a new trial postponed until the Glankler firm had the opportunity to study the transcript of evidence (Tr. 490-491, 421-424; Hearing Exhibit 1). In addition, he breached the written agreement made with his client on January 18, 1978, wherein he agreed to postpone a hearing on the motion for new trial until he had an opportunity to study the transcript (Tr. 421-424, 490-491; Hearing Ex.2). Mr. Livingston testified that the reason he breached these agreements was that he "wanted to be out of the case and let you [Mr. Glankler] get on with your appeal just as soon as you possibly could" and that he "wanted to be shed of Richard Austin and his whole family and...[the Glankler] firm." (Tr. 490-491).

Thereafter while still counsel of record, in correspondence sent to his

client and Judge Beasley, Mr. Livingston states that "I have been receiving obscene and threatening phone calls recently. You and your wife have not 'let a contract' on me have you?" (Tr. 425-427; Hearing Exhibit No. 6). In addition, during an appearance by Mr. Livingston in Judge Beasley's Court on the Petition to Rehear Motion for New Trial filed by the Glankler firm, Mr. Livingston referred to Mr. Austin as "a crook". (Tr. 409-410).

So evident was the conflict between Mr. Livingston and his client, Richard Austin, that during this hearing Judge Beasley (who had presided over the Petitioner's trial for murder) testified that he became concerned:

> "Q. ...I'll ask, Your Honor, if it did cause you concern to have a motion before your Honor set for March 16 on a petition to rehear the overruling of that motion for new trial, to be in possession then of a letter from trial counsel asking his client

if he had, quote, "let a contract", close quote, on him, when that was the subject matter of the case, State versus Richard Austin?

Did that concern you, sir, whether Mr. Livingston was having a conflict with the client or was continuing to appear and representing him the best he knew how as a fact, not as an opinion or a conclusion or any of those other things?

A. Yes, sir, I would say so, Mr. Glankler, at that time when I received it and subsequent thereto, yes.

. . .

Q. Judge, realizing what he had written on February 22nd, that Exhibit 6, and realizing those statements made in open court on March 16 that his client was a crook, did Your Honor have concern that there were conflicting considerations between Messrs. Austin and Mr. Livingston?

A. I'd have to say yes." (Tr. 666-667, 669).

At the time Mr. Livingston agreed to represent Mr. Austin on the murder charges, Mr. Livingston was representing both Mr.

Austin and Mrs. Austin on pending gambling charges (Tr. 451-453). Mr. Livingston stated in his testimony that from the very outset, it was his theory that Joanne Austin was involved in the murder, and that Richard Austin was involved, according to his belief, as an accessory after the fact (Tr. 407-408). In this regard, Mr. Livingston testified during the hearing that Joanne Austin and Jack Blankenship were tried "in absentia" (Tr. 467).

Approximately three weeks before the trial, Mr. Livingston wrote a letter to Mr. Austin wherein Mr. Livingston threatened to withdraw as counsel if his fee was not paid (Tr. 382-384).

6. Beasley and DeCoster Criteria

If we return to the critera as set out in United States v. DeCoster, 478 F.2d 1197 (D.C. Cir. 1973), one must view Mr.

Livingston's failure to adequately confer with his client, give proper advice, and investigate the case, both factually and legally, as demonstrating ineffectiveness in his representation of the Petitioner.

Prior to his client taking the stand Mr. Livingston had little or no discussion with his client regarding his client's testimony (Tr. 399, 131-132). And, in addition, until the trial, Mr. Livingston never discussed with his client whether or not his client should take the stand (Tr. 130). The only potential witness interviewed by Mr. Livingston was Jack Blankenship, and Mr. Livingston testified that he did not plan to take any other witnesses' statements (Tr. 332, 413-414).

Mr. Livingston's inadequate preparation, factually and legally, is dramatically demonstrated by his failure to put on any evidence or to call even one

witness during the sentencing phase of the Petitioner's trial. In fact, Mr. Livingston indicated that he never interviewed any potential witness for the sentencing stage of the trial and that he does not "recall ever having the intention of calling any" witnesses during the sentencing stage (Tr. 360-362). Mr. Austin's sister, Midge Edwards, tried to get Mr. Livingston to call her as a witness during the sentencing phase, but Mr. Livingston did not use her (Tr. 294).

In two cases recently decided by the United States Court of Appeals for the Eleventh Circuit, it was held that the failure of an attorney to make any preparations for the sentencing stage of a capital murder trial deprives his client of effective assistance of counsel. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), and Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

In Blake the proof demonstrated that the defendant's trial counsel made no preparation whatsoever for the sentencing stage of the defendant's trial. The Court stated that "an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Id., at p.533. In examining the question of whether the defendant had been prejudiced by the failure of his trial counsel to follow the proper standard, the Court indicated that failure to prepare for the sentencing stage of a capital murder case is almost tantamount to no defense at all. Id., at p. 535. Further, the Court stated that the attorney's

> "failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such

> an opportunity [to demonstrate mitigating circumstances as if the Court has not permitted him to put on any mitigating evidence]. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony." Id., at p.535.

In Tyler the Court was reviewing a case where trial counsel in a capital murder prosecution failed to present any evidence during the sentencing stage of the trial. Taking into consideration proof of mitigating circumstances that two family members could have provided (if they had been called to testify), as well as mitigating evidence from outside the family that was possibly available, the Court concluded that there was a "reasonable probability that the result of the proceeding would have been different" and that the defendant had been deprived of effective assistance of counsel. Id., at pp.745-746.

The Black and Tyler cases demonstrate that the failure of an attorney to put on any evidence during the sentencing stage of a capital murder case falls below the standard of care required of such attorney. These cases support the position that the failure to put on any proof during the sentencing phase is so close to being per se prejudicial that almost any evidence that was or could have been available to the trial counsel will suffice to demonstrate prejudice to a defendant.

The Petitioner's sister, Ms. Midge Edwards, testified that she had told Mr. Livingston her brother's whole life story and that she tried to get him to let her testify at the sentencing phase of the trial. (Tr. 294). Ms. Edwards was willing and prepared to testify to her brother's good character as he had lived with her most of his life.

It is submitted that Mr. Livingston's actions and inactions during the sentencing phase of the Petitioner's trial fell below the standard of care required by attorneys in criminal cases and that the Petitioner was prejudiced thereby. Accordingly, at the very least, the Petitioner is entitled to a new hearing in regard to the sentence to be imposed.

Inadequate factual preparation and improper trial strategy is further evidenced by Mr. Livingston's failure to object, during the State's proof in the sentencing stage of the trial, to the introduction of a prior conviction of a felony (larceny) not involving the use or threat of violence (Trial Transcript, 1056; Tr. 669-673). The State introduced the record indictment and conviction of Richard Austin of larceny and receiving stolen property, the conviction date being

October 19, 1966 (Trial Transcript, 1056). No objection was made to the introduction of such evidence (Trial Transcript, 1056-1057). Nor was any objection entered concerning additional testimony as to whether the conviction was by a plea of guilty or by a jury verdict, what was the outcome of a motion for new trial that was prayed for in the case, or whether the offense was subsequently appealed. The State was permitted to show, without objection, that the conviction was obtained by a jury verdict, that a motion for a new trial was prayed for, that it was heard and overruled on the date of January 5, 1967, in Division I of the Criminal Court of Shelby County, that there was subsequently an appeal and that the conviction was in fact affirmed by the Supreme Court of Tennessee by procedendo (Trial Transcript, 1056-1057). The introduction of such

evidence was not in accordance with the previous statutory requirement that such felonies involve the use or threat of violence to the person. T.C.A. §39-2-203(i)(2); See also, State v. Johnson, 661 S.W.2d 854 (Tenn. 1983). Although the jury apparently did not base its decision to impose the death penalty on this particular aggravating circumstance, the danger of allowing such irrelevant evidence at this critical stage of the trial and its probability of prejudice was obvious.

During the Petitioner's trial the State also introduced testimony from two witnesses (Trial Transcript, 1065 1099) for the proposition that the victim was a special deputy sheriff. At page 1106 of the trial transcript, when asked the conclusory legal question of whether he (Julian Watkins) was a peace officer, there was no

objection by counsel and there was no follow-up on the response of the witness, to-wit:

> "He was very definitely a sworn deputy sheriff of Shelby County."

Mr. Livingston did not object to the introduction of such testimony and did not throughout his cross-examination of these witnesses attempt to establish whether or not Mr. Watkins was actually engaged in the performance of his duties of a peace officer, if indeed he was a peace officer (Trial Transcript, 1068-1071, 1100-1106), required by the statute. T.C.A. §39-2-203(i)(9). Mr. Livingston's failure to recognize the requirements of the statute and to conduct his examination accordingly was clearly error.

Mr. Livingston testified that it was always one of his trial tactics to go to trial when he was forced to do so (Tr.,

366). Apparently there was some confusion as to the exact trial date. At one time the trial was set to commence on October 31, 1977. However, Mr. Livingston testified that on October 7, 1977 (ten days before the actual trial date), the trial date was moved forward approximately two weeks to October 17, 1977 (Tr., 381). The Petitioner indicated that he was confused as to the status of the matter on October 17, 1977. He was under the impression that the case was going to be postponed (Tr. 120-121, 365-366). Mr. Livingston testified at the hearing that he probably thought the case would be continued on October 17, 1977, since this was the first setting, and he further testified that he probably told the client that the case would be continued (Tr. 365-366).

Inadequate investigation and preparation on the part of Mr. Livingston was also evidenced during the voir dire. During the voir dire, Mr. Livingston indicated a lack of a working familiarity with the dictates of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Mr. Livingston made no attempt to rehabilitate any witness which was challenged by the State on Witherspoon grounds (Trial Transcript, 16-264). In fact, Mr. Livingston did not have a copy of the Witherspoon opinion in his file for study or for reference purposes, and he indicated at the hearing that he made no study of the Witherspoon line of cases in preparation for the trial (Tr. 370-371). Mr. Livingston had 15 preemptory challenges available to him but used only six and used these six all at one time without further inquiry of the venire (Tr. 367-368).

II.

The Trial Judge Erred in Dismissing the Petition for a Writ of Error Coram Nobis

At the hearing which commenced upon December 6, 1983, the Petitioner was prepared to introduce evidence in support of a Petition for a Writ of Error Coram Nobis. The Trial Court ruled, upon motion of the State, that the Petition would be dismissed because the Court felt that the evidence sought to be introduced was insufficient as a matter of law under the design and intent of T.C.A. §40-26-105 (Tr. 55-57). However, the Trial Court accepted an offer of proof in the form of a statement of Levi Aaron Haywood (Tr. 57-60).

Upon receiving knowledge of the existence of a letter postmarked some time in March, 1978 (some four or five months after the Petitioner's trial) from Mr.

Haywood and addressed to a relative of the Petitioner, the Petitioner's present counsel went to the State Penintentiary in Nashville, Tennessee on March 14, 1978, to take the statement previously referred to. In this statement Mr. Haywood states that in a conversation with Terry Casteel during the period of time after the Petitioner's trial, Casteel told him that he (Casteel) had lied during the Petitioner's trial when he told the jury that the Petitioner had hired Jack Blankenship to kill Julian Watkins.

The Petitioner, at the hearing, was prepared to put Mr. Haywood on the stand to testify in accordance with his statement. The Petitioner also was prepared to call Terry Casteel as a witness.

The writ of error coram nobis developed at common law to relieve litigants, both civil and criminal, from

judicial wrongs for which there is no remedy. 18 Am.Jur.2d CORAM NOBIS, ETC. §1, p.446. Generally, the writ of error coram nobis is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record and not available by appeal or otherwise, and not discovered until after rendition of the judgment, without fault of the party seeking relief. 24 C.J.S. Criminal Law §1602(2), p.667. The existence of the writ, and its application, is designed to purify and keep pure the administration of justice and is designed to enable a convicted person to establish that the conviction was procured under circumstances which offend fundamental conceptions of justice and, as a result, it is submitted that the writ constitutes part of the protection afforded by the due process of law clause of the

Constitution.[4/] Id.

In many jurisdictions the writ of error coram nobis, or some form thereof, has been codified by statute. Id., at p.449. Tennessee is such a jurisdiction. T.C.A. §40-26-105 (formerly T.C.A. §40-3411).

Tennessee Code Annotated §40-26-105 was originally enacted in 1955. Its enactment was an obvious reaction to the case of Green v. State, 187 Tenn. 545, 216

4/ The Court has previously held that the constitutional requirements of due process is not satisfied when a conviction is obtained under circumstances which would afford a basis of relief under the petition for writ of error coram nobis. Mooney v. Holohan, 294 U.S. 103, 110-112, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935). Although the relief available under the Tennessee coram nobis statute may go beyond the relief avilable at common law, it is submitted that the relief avilable under the statute is commensurate with the protection afforded by due process of law.

S.W.2d 305 (1948), wherein it was held that a writ of error coram nobis was unavailable in criminal cases because the statute provided for the writ of coram nobis only in civil cases.

As it currently exists, T.C.A. §40-26-105 provides as follows:

> "There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. Notice of the suing out of the writ shall be served on the district attorney general. No judge shall have authority to order the writ to operate as a supersedeas. The court shall have authority to order the person having custody of the petitioner to produce him in court for the hearing of the proceeding. The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of

error, or in a habeas corpus proceeding. Upon a showing by the defendant that he was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner the judgment complained of shall be set aside and he shall be granted a new trial in that cause. In the event a new trial is granted the court may, in its discretion, admit the petitioner to bail, provided the offense be bailable. If not admitted to bail the petition shall be confined in the county jail to await trial. The petitioner or the state may pray an appeal in the nature of a writ of error to the Supreme Court from the final judgment in this proceeding." (Emphasis Added).

That portion of the statute which has been underlined above is the 1978 amendment. The Amendment did not change any of the language of the statute as originally enacted; it merely added to the statute.

Prior to the time that T.C.A. §40-26-105 was amended in 1978, the Supreme Court of Tennesese indicated that a writ of error coram nobis would not lie for false testimony. Rowe v. State, 498 S.W.2d 322, 325-326 (Tenn. 1973). Since it is apparent that subsequently, or newly discovered evidence of perjured testimony at trial relates to matters which were litigated at trial (i.e. credibility of the particular witness), it seemed that considering such evidence was not proper in determining whether to grant a writ or error coram nobis.

It is apparent that the 1978 amendment was designed either to expand the availability of the writ or to clarify that the writ did exist as to subsequently or newly discovered evidence although it relates to matters which were litigated at the trial.

On third and final reading of the amendments, the sponsor of the amendment had this to say:

> "...[T]his legislation came as the result of the attorney in Knoxville contacting me in regard to a case which occurred where after the time for, uh, properly filing motion for a new trial it was discovered that the witness, who had in effect resulted in the conviction of a defendant, had lied, and, uh, a man had been falsely convicted and this, uh, Bill provides language where a Writ of Coram, uh, Error Coram Nobis would be permitted, uh, if the Judge determines that such evidence may have resulted in a different judgment and is designed to correct the situation where evidence comes up later on after the time for properly filing motion for new trial,...." (Senate Debate[5/] on House Bill No. 1835, March 22, 1978).

5/ The floor debates on the statutes being considered by the Tennessee General Assembly are available through cassette tapes on file with the Tennessee State Library and Archives in Nashville, Tennessee. The Supreme Court of Tennessee has sanctioned the use of the debates of the General Assembly in determining legislative intent. Watts v. Putnam County, 525 S.W.2d 488, 492, n.4.

Thus, it clearly appears that a writ of error coram nobis will be available in a situation where it appears that a witness at a petitioner's trial has perjured himself.

It is apparent that the Tennessee Legislature, as a matter of public policy of this state and in an effort to see that due process is afforded to those convicted of a crime, sought to assure that subsequently or newly discovered evidence, although relating to matters litigated at trial, would be considered in determining whether a writ of error coram nobis should be granted. It is thus submitted that subsequently or newly discovered evidence demonstrating that Terry Casteel, the witness essential to the State's case against the Petitioner, had perjured himself at the Petitioner's trial was

proper evidence in considering whether a writ of error coram nobis should be issued.

The Attorney General and the Court of Criminal Appeals took the position that the testimony of Levi Haywood does not qualify as a proper basis for coram nobis relief under T.C.A. §40-26-105. It was asserted that the testimony of Levi Haywood would merely be impeachment evidence. The characterization of the testimony of Haywood as "impeachment" testimony does not change the fact that it constitutes evidence that Terry Casteel perjured himself in testifying that the Petitioner had hired Blankenship to commit the murder. If such evidence is newly discovered, it is clear that such evidence should have been considered in determining whether a writ of error coram should be issued.

Such evidence is admissible to demonstrate perjury. The falsity of a

Such evidence is admissible to demonstrate perjury. The falsity of a statement made by one accused of perjury may be shown by any competent evidence, such as statements, either verbal or in writing under oath or unsworn, which conflict with the allegedly false statement. 70 C.J.S. Perjury §59, p.530; See also United States v. Goldberg, 290 F.2d 729 (2nd Cir. 1961) and Berhle v. United States, 100 F.2d 714 (D.C. 1938).

The Petitioner was prepared to call, as a witness, Terry Casteel. There is proof in the record that Terry Casteel and Levi Haywood were incarcerated at the same time in the Shelby County Jail for some time after the Petitioner's trial for murder (Tr. 79-81). If Casteel denied having talked to Haywood and telling Haywood that he had lied at the Petitioner's trial, the Petitioner's counsel would then have called

previous statement and demonstrated that Casteel had perjured himself.

In the case sub judice, the admissions of Terry Casteel to Levi Haywood to the effect that he (Casteel) had perjured himself were, through no fault of the Petitioner, not known until March of 1978, after the Petitioner's Motion for New Trial was denied by the trial court. The substance of this evidence was not presented and fully explored at the Petitioner's trial. The result is that the Petitioner was denied due process of law by the failure of the trial judge to conduct a hearing on the Petition for a Writ of Error Coram Nobis.

CONCLUSION

It is respectfully submitted that the facts and circumstances dictate this Court's holding that the Petitioner's

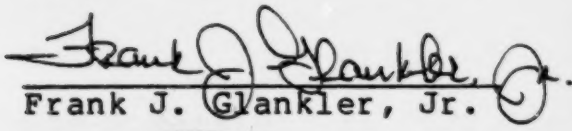
CONCLUSION

It is respectfully submitted that the facts and circumstances dictate this Court's holding that the Petitioner's representation was constitutionally ineffective and that matters of substantial defense were either not presented or, if at all, were improperly presented for adjudication. In light of the record as a whole it is impossible to say that Mr. Austin was not prejudiced, and, in fact, prejudice was established.

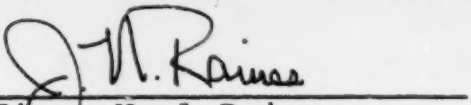
In addition, the Petitioner respectfully submits that the trial judge committed error in dismissing the Petition for Writ of Error Coram Nobis, and, as a result, the Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment of the Constitution.

The Petitioner respectfully requests that the Court grant the Petition for a Writ of Certiorari.

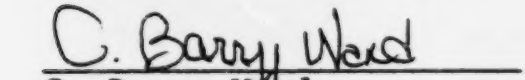
Respectfully submitted,



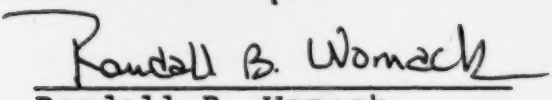
Frank J. Glankler, Jr.



Jimmy Neal Raines



C. Barry Ward



Randall B. Womack

OF COUNSEL:

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CHASE, ROBINSON & RAINES
1700 One Commerce Square
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(901)525-1322

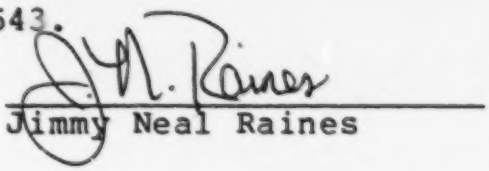
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Mr. Gordon W. Smith, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37129, by placing the same in the U.S. Mail, first class, postage prepaid, this 1ST day of November, 1985.

Randall B. Womack

CERTIFICATE OF MAILING

I do hereby certify that the original and forty-two (42) copies of the foregoing Petition for Writ of Certiorari was placed in the United States Mail, first-class and postage prepaid, this 1st day of November, 1985, and was addressed as follows: Clerk of the Supreme Court of the United States, Washington, D.C. 20543.



Jimmy Neal Raines

INDEX TO THE APPENDIX

A-1 -- Judgment and Order of the Supreme Court of Tennessee dated July 8, 1985

A-2 -- Judgment and Order of the Supreme Court of Tennessee dated September 5, 1985, denying the Petition to Rehear

A-3 -- Order and Opinion of the Court of Criminal Appeals dated April 17, 1985.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,

Appellee,

v.

Shelby Criminal
C.C.A. No. 33

RICHARD HALE AUSTIN,

Appellant.

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the Appellant.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

RICHARD HALE AUSTIN,

Petitioner-Appellant,

v. Shelby Criminal No. 33

STATE OF TENNESSEE,

Respondent-Appellee.

O R D E R

The Court has considered the Petition to Rehear filed by Richard Hale Austin and is of the opinion that the said Petition to Rehear should be denied.

The Petition to Rehear the denial of the Appellant's application for permission to appeal is denied at the cost of the Appellant.

PER CURIAM

IN THE COURT OF CRIMINAL

APPEALS AT JACKSON

JANUARY, 1985

RICHARD HALE AUSTIN,

Appellant — No. 33
Shelby County

Vs. — Hon Dick Jerman, Jr.
Judge by designation

STATE OF TENNESSEE, — (Post-Conviction and Coram Nobis)

Appellee

FOR THE APPELLANT:

FRANK J. GLANKLER, JR.
J. N. RAINES
C. BARRY WARD
RANDALL B. WOMACK

Memphis, Tennessee

FOR THE APPELLEE:

HUGH W. STANTON, JR.
Dist. Atty. Gen.

VERONICA COLEMAN
Ass't. Dist. Atty. Gen.

W. J. MICHAEL CODY
Attorney General

GORDON W. SMITH
Ass't. Atty. Gen.

OPINION FILE _____.

AFFIRMED

WILLIAM S. RUSSELL
SPECIAL JUDGE

OPINION

Richard Hale Austin, heretofore convicted of first degree murder and of being an accessory before the fact to murder in the first degree and sentenced to die in the electric chair, filed a petition for post-conviction relief and also a petition for a writ of error coram nobis. Austin appealed his conviction and sentence to the Tennessee Supreme Court. That court affirmed the judgment of the trial court. State v. Austin, 618 S.W.2d 738 (Tenn. 1981). The United States Supreme Court denied a petition seeking a certiorari review by that court. 102 S. Ct. 980 (1981).

The petition for post-conviction relief was bottomed upon the thesis that Austin was unconstitutionally denied the effective assistance of counsel for his defense. The petition for the writ of

error coram nobis had as its grounds an alleged post-trial statement to a penitentiary inmate, Haywood, by a state's witness, Casteel, saying that Casteel's trial testimony inculpating Austin was untrue; and a statement by Blankenship, the admitted triggerman in the subject murder, saying that Austin had not in fact hired him to do the killi , (as the jury had found that Austin had done).

The trial court summarily dismissed the petition for the writ of error coram nobis, but permitted the factual issues set out therein to be fully developed upon the patiently held evidentiary hearing conducted to address the factual issues presented by the petition for post-conviction relief.

The trial judge held that Austin was not unconstitutionally deprived of the effective assistance of counsel. That

ruling has been appealed to this Court; where Austin's appellate counsel have presented the issues raised with skill, dedication and a high level of professionalism. This Court has carefully reviewed the case in all of its aspects, being well aware that the appellant has been sentenced to death and that such a sentence carries no room for harmful error in the conviction process. We find that the trial judge correctly ruled, and we affirm the judgment dismissing both petitions.

Austin contends that his trial counsel, Robert I. Livingston failed to measure up to the standard of counsel competency required by Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), wherein our Supreme Court announced that henceforth the standard is simply whether the advice given, or the services rendered by the

attorney, are within the range of competency demanded of attorneys in criminal cases. The Tennessee Supreme Court therein cited Beasley v. United States, 491 F2d 687 (6th Cir. 1974) with approval. That case holds that a criminal defense attorney must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously and unaffected by conflicting considerations protect his client's interests. Also cited with approval in Baxter v. Rose, supra, is United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), which requires inter alia, that counsel be guided by the American Bar Association Standards for the Defense Function.

In reviewing this record, and measuring Attorney Livingston's performance against the established standard for a

constitutional representation, we have given particular attention to (1) his tactical decision to not call the triggerman, Blankenship, when he, Livingston, had in his possession at trial a signed statement of Blankenship exculpating Austin; and (2) his failure to introduce any proof whatsoever upon the sentencing hearing, whereupon the jury was called upon to choose between life imprisonment and death by electrocution for his client.

Without going into an exhaustive review of the case, it suffices for us to say that one Watkins, who was an undercover police officer scheduled to be a prosecution witness against Austin in a pending prosecution for illegal gambling, was shot to death in a contract killing by an escaped convict named Blankenship. One Casteel, an employee of Austin, testified

to his own participation in the criminal undertaking, and testified that he was present at the crime scene and that he witnessed the hiring of Blankenship by Austin to commit the cold-blooded assasination of Watkins. About three months prior to the commencement of Austin's trial, Blankenship struck a plea bargain and received a life sentence for Watkins' murder. This occurred July 7, 1977. A week later Attorney Livingston obtained Blankenship's written statement, in which Blankenship denied that Austin had hired him to do the killing.

Attorney Livingston chose not to call Blankenship as a defense witness. This is strongly relied upon by Austin, through present counsel, as being an omission constituting unconstitutional incompetency. Expert testimony by two experienced criminal case defense attorneys was

introduced to support this position. Attorney Livingston, in explanation of his action, testified that he had no confidence in Blankenship's credibility and made a deliberate decision not to call him. At that time Blankenship was a penitentiary inmate, who had already negotiated a plea bargain. He was an admitted cold-blooded killer. The defendant, Austin, testifed in his own behalf, and, of course, denied hiring Blankenship. The State had called Casteel, who had testified to the contrary. The State did not call Blankenship.

It is not difficult to support the tactical decision of Attorney Livingston. First, the rational thrust of his defense was to disassociate his client from Blankenship, who admittedly had committed this reprehensible crime. The act of calling Blankenship as his witness, even if all went well with the testimony, would

arguably identify Blankenship with Austin in the eyes of the jury.

Even more persuasive is the logically presumed uncertainty of what such a man might testify to, and the certainty of the defendant's doom if Blankenship were to testify favorably for the State. Here was Blankenship, a veteran felon, incarcerated under the control and discipline of the State, who had made a deal with the State in order to avoid the death penalty himself. Not all veteran criminal defense attorneys would feel sufficiently secure in calling such a witness, to think it to be the indicated thing to do, even when armed with his prior written statement. What stood to be lost by such a tactic was everything. Had Mr. Livingston called Blankenship, and had he changed his story and testified that Austin had hired him, Mr. Livingston's judgment in putting him on

the stand would certainly have been questioned.

The controlling point is that this was a tactical decision that had to be faced and made during the course of the trial. It cannot be said as a matter of law that the decision made and the course followed constituted ineffective assistance of counsel

Next, we focus upon the admitted failure of Mr. Livingston to introduce any proof upon the sentencing phase of the trial. Our then new statute, T.C.A. §39-2-203, contained this language:

> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or

rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. * * *.

* * * * * * *

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably

believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or the advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

Nothing has come to our attention, in reviewing the trial transcript and the transcript of the evidence introduced upon the hearing upon the post-conviction petition, that suggests a mitigating circumstance that should have been presented to the jury upon the sentencing hearing. Present counsel do not suggest specific evidence that should have been presented. They do mention that Austin's sister, Midge Evans, tried to get Mr. Livingston to call her as a witness during the sentencing phase and he declined; but they do not suggest what she might have testified to. It is also argued that a minister and a neighbor would have testified, we assume to Austin's good character. Given the facts of this case, the failure to call character witnesses for Austin would not have changed anything.

Complaint is made that Mr. Livingston failed to make an adequate factual investigation of the case, and failed to interview view potential witnesses. The trial judge found to the contrary and the evidence does not preponderate against this finding. Nor is there any showing of prejudice resulting from this alleged deficient performance.

It is also argued in Austin's behalf that there was a failure to cross-examine or to adequately cross-examine the State's witnesses. In our view the record does not support this Compl int. Cross-examination may or may not be the mark of competent advocacy. It is a two-edged sword the overuse of which may be a poor trial tactic. Certainly, absent the demonstration of a specific prejudice from its non-use or under-use, and we have no showing of such prejudice here,

cross-examination falls into the category of trial strategy. See Hellard v. State, 629 S.W.2d 4 (Tenn. 1982). The trial judge found no merit to this complaint, and we agree.

We find no prejudicial error from trial counsel's failure to object to evidence upon the trial. Likewise, we hold that Attorney Livingston's submission of his motion for a new trial without having first read the transcript of the trial (in which he participated) did not amount to incompetent practice. Present counsel have made no showing that trial counsel failed to raise any meritorious issue in the motion for a new trial.

There was a degree of non-cooperation between trial counsel and appellate counsel during the period of the transfer of defens responsibility. Despite his assurances to present counsel that he would not do so,

Mr. Livingston submitted his motion for a new trial without giving present counsel an opportunity to submit amendments, including the affidavit of Blankenship saying that Austin was not involved in the murder. However, as we view it this affidavit was not newly discovered evidence. Such a statement, as we have already discussed, was in defense counsel's hands for three months prior to the trial, so would not have qualified as newly discovered evidence for the purpose of obtaining a new trial. Sherrod v. State, 567 S.W.2d 482 (Tenn. Crim. App. 1978). No prejudice from counsel non-cooperation has been shown. This reasoning also applies to the assertion that Mr. Livingston promised to obtain a continuance for the hearing upon the motion for a new trial and did not attempt to do so. Present counsel were able to present all appealable issues to

the appellate courts. We find nothing in this record to demonstrate that Attorney Livingston failed to preserve any meritorious issue for appeal.

Attorney Livingston, after the trial was over, wrote to Austin, with a copy to the trial judge, indicating a dislike for and distrust of Austin. Subsequently, in open court, he referred to Austin as a crook. We find that Attorney Livingston's conduct was unprofessional; but we find no evidence of this negative relationship during the trial itself and no prejudice to Austin's right to a fair trial.

Finally, we address the issue of the summary dismissal of the petition under T.C.A. §40-26-105 for the writ of error coram nobis. We have held in Cole v. State, 589 S.W.2d 941 (Tenn. Crim. App. 1979) that in ruling upon such a petition, the trial court must find:

(1) whether or not there now exists subsequently or newly discovered evidence (even though related to matters previously litigated),

(2) which might have resulted in a different judgment had it been presented at trial,

(3) but which was not presented at that time through no fault of the defendant.

Obviously, tested in this light, the basis for this petition (i.e. the statements of Haywood and Blankenship) do not qualify for coram nobis relief. Haywood's statement is classic impeachment-only evidence, and as such does not constitute newly discovered evidence warranting a new trial. Harper v. State, 206 Tenn. 509, 334 S.W.2d 933 (1960); Hicks v. State, 571 S.W.2d 849 (Tenn. Crim. App. 1978).

Blankenship's statement does not constitute newly discovered evidence, as previously discussed, because it wasn't newly discovered but was already known upon the trial, so it does not qualify Austin for coram nobis relief.

The learned trial judge who heard this case by designation of the Tennessee Supreme Court held a careful, courteous and full evidentiary hearing upon the issues. He then drafted and filed a comprehensive findings of fact and conclusions of law. We affirm his judgment, including his commendation of present counsel on both sides.

s/
William S. Russell,
Special Judge

CONCUR:

s/
Robert R. Dwyer, P.P.J.

s/
Joe D. Duncan, J.